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Recognizing a Constitutional Right of Media Access to Evidentiary Recordings in Criminal Trials

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RECOGNIZING A CONSTITUTIONAL RIGHT OF MEDIA ACCESS TO EVIDENTIARY RECORDINGS IN CRIMINAL TRIALS

As a result of the broadcast media's expanding news coverage of criminal trials,[1] journalists increasingly seek access to audio or video recordings that have been introduced into evidence at trial.[2] Such evidentiary recordings are well suited to the distinctive needs and characteristics of the broadcast media.[3] But the same features of the recordings that attract the interest of broadcast media likewise pose the danger of prejudicial pretrial publicity, which undermines a defendant's right to a fair trial.[4]

The Supreme Court has not yet recognized that the news media's access to evidentiary recordings is protected by the Constitution.[5] Consequently, the legal bases of the media's access are uncertain, and courts

1. Traditionally broadcast media were not interested in covering judicial proceedings. *See* Wilson, *Justice in Living Color: The Case for Courtroom Television*, 60 A.B.A. J. 294, 294 (1974).

The traditional lack of interest resulted from the numerous restrictions placed on the means of covering judicial proceedings. *See* Zimmerman, *Overcoming Future Shock:* Estes *Revisited or a Modest Proposal for the Constitutional Protection of the News-gathering Process*, 1980 DUKE L.J. 641, 663. American Bar Association Canons and the *Estes v. Texas* decision, 381 U.S. 532 (1965), were widely believed to prevent camera or broadcast coverage of trials. *See* D'Alemberte, *Cameras in the Courtroom*, LITIGATION, Fall 1982, at 20. For many years some courts also prohibited sketch artists. *See* United States v. Columbia Broadcasting System, 497 F.2d 102, 106 (5th Cir. 1974). Even with the use of artists' sketches, coverage seemed so stilted that broadcasters frequently decided not to cover judicial proceedings at all. *See* Spann, *Cameras in the Courtroom — for Better or for Worse*, 64 A.B.A. J. 797, 797 (1978).

2. The term "recordings" includes both audio and video recordings. The term "evidentiary recordings" denotes recordings that have been admitted into evidence at criminal trials.

3. The broadcast media generally attempt to communicate news dramatically. It must attract the attention of an audience that may simultaneously be engaged in other activities and thus it emphasizes the representation of events rather than the narration of a description. *See* Lichty, *Video versus Print*, WILSON Q., Special Issue 1982, at 49, 52-53. *See generally* I. FANG, TELEVISION NEWS, RADIO NEWS 184, 186 (1980); E. EPSTEIN, NEWS FROM NOWHERE 195-96, 263 (1973); Zimmerman, *supra* note 1, at 662.

4. The deleterious effect of prejudicial publicity on a defendant's right to a fair trial has been a perennial problem. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976); Irvin v. Dowd, 366 U.S. 717 (1961). *See generally* REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS — FAIR TRIAL" ISSUE, 45 F.R.D. 391, 394-95 (1968); Ares, Chandler v. Florida: *Television, Fair Trial and Due Process*, 1981 SUP. CT. REV. 157, 164; Douglass, *Media Technology, Fair Trial, and the Citizen's Right to Know*, 54 N.Y. ST. B.J. 364, 365-66 (1982); Stephenson, *Fair Trial—Free Press: Rights in Conflict*, 46 BROOKLYN L. REV. 39, 40 (1979).

5. *See infra* note 8 and accompanying text. One trial court has recognized that the public has a first amendment right of access to court records, including evidentiary recordings. United States v. Carpentier, 526 F. Supp. 292 (E.D.N.Y. 1981), *aff'd*, 689 F.2d 21 (2d Cir. 1982).

may deny the media access without properly analyzing the conflicting rights and interests present in particular cases.[6] As a result, courts may deny the broadcast media access to evidentiary recordings even when such access does not conflict with the rights of a defendant.[7]

This Note advocates recognition of a constitutional right of press access to evidentiary recordings in criminal trials. It proposes methods for accommodating the competing rights of the news media to have access to evidentiary recordings used in criminal trials and the right of criminal defendants to a fair trial. Part I examines the source of controversy and sets forth the limitations inherent in the current common law presumption of press access to judicial records. Part II discusses the underlying values that require recognition of the constitutional right and suggests that such a right can be accommodated with a defendant's right to a fair trial.

I. THE CONTROVERSY OVER PRESS ACCESS TO EVIDENTIARY PROCEEDINGS

In *Nixon v. Warner Communications, Inc.*,[8] the Supreme Court confronted suddenly, for the first time, and without benefit of extensive prior state or federal litigation, the question of whether the broadcast media should be granted access to evidentiary recordings.[9] In this case, news broadcasters seeking access to the Watergate tapes asserted that the first and sixth amendments supported their right to copy and broadcast the tapes.[10] Although the Court found unique statutory grounds

6. *See infra* notes 34-43 and accompanying text.

7. *See infra* notes 34-37 & 70 and accompanying text.

8. 435 U.S. 589 (1978).

9. The Court acknowledged that the scope of the media access was a rarely litigated issue. *Id.* at 597. Despite the absence of prior litigation, the issue of access is significant. There may be many more instances than are suggested by the reported case law. A grant or denial of access is merely one of many orders issued by a trial judge and, unless appealed, is unlikely to be reported. Historically, broadcasters have not aggressively asserted their first amendment rights. *See* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass media*, 75 MICH. L. REV. 1, 17 (1976). Because of the time pressures the broadcast media face, they are unlikely to appeal a denial of access. *See* I. FANG, *supra* note 3, at 171. By the time an order reversing the denial of access can be obtained, the material sought will often no longer have any news value. Consequently, prudent use of resources would lead the news media to contest denials of access to evidentiary recordings only in especially significant cases.

This inhibition of the exercise of first amendment rights that inevitably results from any form of prior restraint or restriction on the newsgathering process has been frequently recognized and deplored. *See generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976); New York Times Co. v. United States, 403 U.S. 713, 714-15 (1971) (Black, J., concurring); Fahringer, *Charting a Course From the Free Press to a Fair Trial*, 12 SUFFOLK U.L. REV. 5-9 (1978); Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A. J. 55, 59-60 (1976). *But see* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 64-66 (1981) (expressing skepticism that a few days delay in reporting on judicial proceedings is devastating to the news value of such reports).

10. 435 U.S. at 608-10. *See infra* notes 53-60 and accompanying text.

for its decision denying access,[11] it stated that the first and sixth amendments did not require a different result.[12]

Even before the Supreme Court's rejection of a constitutional right of news media access to evidentiary recordings, persons seeking the release of such recordings resorted to a common law presumption in favor of access to judicial and other official records[13] that "predates the Constitution itself."[14] After the Court's refusal to recognize a constitutional right of access, the common law presumption remains the only effective means for third parties to obtain access to evidence used in trials.

A. Presumption of Access to Judicial Records at Common Law

American courts traditionally have allowed nonlitigants access to judicial records without requiring any showing of special need or interest.[15] Nevertheless, if a request for access is motivated by private spite, a desire to promote public scandal, or other improper motive, courts have discretion to deny access.[16]

Access to official records includes both the inspection and copying of the record.[17] Although the common law presumption that access

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11. Although neither of the parties thought it was applicable, the Court relied on the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, Title I, §§ 101-106, 44 U.S.C. § 2107 note (1976). The Court interpreted the Act as providing that the legislative and executive branches control public access to presidential records; consequently, it concluded that release of the tapes by courts would be improper. 435 U.S. at 603-06.

12. 435 U.S. at 608.

13. It is well established that public records include judicial records. *See, e.g., Nixon*, 435 U.S. at 597; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 895-99 (E.D. Pa. 1981). *See generally* H. CROSS, THE PEOPLE'S RIGHT TO KNOW 136 (1953).

14. United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976) (footnote omitted), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

15. At common law, English courts required a nonlitigant seeking access to court records to demonstrate a property interest in the document or to show a need for the document as evidence in another lawsuit. American courts have rarely followed the limitations on access adopted by the English courts. Rather, American courts have tended to allow all citizens access to court records. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978). *See generally* Note, *Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right*, 50 FORDHAM L. REV. 551, 557-58 (1982) [hereinafter cited as Note, *Copying and Broadcasting*]; Note, *The Common Law Right to Inspect and Copy Judicial Records:* In Camera *or On Cameras*, 16 GA. L. REV. 659, 660 (1982) [hereinafter cited as Note, *Common Law Right*]; Comment, *All Courts Should Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311, 337-39 (1979) [hereinafter cited as Comment, *All Courts Should Be Open*].

16. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 815 (Ky. 1974). *See generally* Comment, *All Courts Should Be Open*, *supra* note 15, at 343-44.

17. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609, 612 (D.C. Cir. 1981); United States v. Myers (*In re* National Broadcasting Co.), 635 F.2d 945, 949 (2d Cir. 1980); Ortiz v. Jaramillo, 82 N.M. 445, 446, 483 P.2d 500, 501 (1971); H. CROSS, *supra* note 13, at 34. *See generally* 66

includes the right to copy stems from a time when all records were documentary, courts universally have assumed that the presumption applies equally to nondocumentary records.[18]

American courts have allowed public access to official records because they have considered such access to be fundamental to democratic society.[19] Access promotes values underlying the first amendment by ensuring an "informed and enlightened public opinion" regarding matters documented by the records.[20] Access also promotes values underlying the sixth amendment by " '[safeguarding] against any attempt to employ our courts as instruments of persecution,' . . . [promoting] the search for truth, and . . . [assuring] 'confidence in . . . judicial remedies.' "[21]

Despite the importance placed on the common law presumption of public access to official records, the courts have not delineated clearly the scope of public access. The Supreme Court has found it "difficult to distill from the relatively few judicial decisions a comprehensive definition of [the presumption in favor of access] . . . or to identify all the factors to be weighed in determining whether access is appropriate."[22] The Court has declined to define the limits of the presumption and has left the scope of access to be determined by trial courts "in light of the relevant facts and circumstances of the par-

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AM. JUR. 2D *Records and Recording Laws* § 13 (1973) (without the right to copy, the right to inspect is "practically valueless"). *But see* Guarriello v. Benson, 90 N.J. Super. 233, 240, 217 A.2d 22, 26-27 (1966) (request to copy audio recordings of public municipal hearing denied when any resident could listen to tapes and get copy of stenographic transcription).

18. *See* United States v. Mitchell, 551 F.2d 1252, 1258 n.21 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); *see also* Ortiz v. Jaramillo, 82 N.M. 445, 446-47, 483 P.2d 500, 501-02 (1971).

The judicial extension of the right to copy public documents to include nondocumentary public records was not required by the original considerations supporting a right to copy. In the past, most records were documentary, so coextensive rights to copy and inspect conferred little more than the opportunity to obtain the essential discursive information contained by the documents. More sophisticated methods of copying documents, e.g., photocopying, were accepted without question because they merely provided a more efficient method for duplicating the discursive content of documentary records.

In contrast, a right to copy nondocumentary material ensures not only that the discursive content of the public record can be recorded, but it also permits dissemination of the nondiscursive content of the records, such as intonation, pauses, and body language.

Although access might have been denied on the basis that the presumption in favor of access extended only to the type of information contained in documentary records, it is now established that the presumption of access extends to nondocumentary public records and that such access includes the right to copy. United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609, 612 (D.C. Cir. 1981).

19. *Cf.* Note, *Common Law Right, supra* note 15, at 666 (sound public policy requires access because every individual is presumed to know the law).

20. United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

21. *Id.* (quoting *In re* Oliver, 333 U.S. 237, 270 & n.24 (1948)).

22. Nixon v. Warner Communications, Inc., 435 U.S. 589, 598-99 (1978).

ticular case."[23] Judicial controversy has erupted as courts have attempted to define more precisely the strength of the presumption in favor of access in the context of evidentiary recordings.

Several courts have acknowledged the absence of a specific constitutional right of access to evidentiary recordings but have emphasized nonetheless the close connection between the common law presumption of access and freedoms that are constitutionally protected by the first and sixth amendments.[24] Due to their common heritage, both the presumption of access and the sixth amendment are said to promote a "community catharsis" and to satisfy public desire for justice.[25] Moreover, access to judicial records enhances the public observation and understanding of the criminal justice process,[26] thus increasing the benefits resulting from the constitutional protection of the right to a public trial and the right to free expression of ideas.[27]

Courts have recognized that the practical limitations on the public's opportunity to attend trial proceedings[28] and the ease with which replication and broadcast can be accomplished are also important factors in support of the presumption of access.[29] One court has held that after recordings have been played in court, only the "most extraordinary circumstances" justify restrictions on the opportunity of persons who were not present to see or hear the recordings.[30]

In balancing the defendant's fair trial rights with the presumption of access, courts recognizing a strong presumption of access have minimized the potential adverse effect on a defendant's right to a fair trial. These courts have held that access should be denied only when

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23. *Id.*

24. *See, e.g.,* United States v. Edwards (*In re* Video-Indiana, Inc.), 672 F.2d 1289 (7th Cir. 1982); United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609 (D.C. Cir. 1981); United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814 (3d Cir. 1981); United States v. Mouzin, 559 F. Supp. 463, 466 (C.D. Cal. 1983). Other courts have recognized a "strong" presumption in favor of public access to judicial records, including evidentiary recordings. They have held that the presumption is not rebutted by possible prejudice to a defendant's fair trial rights that is highly speculative. *See, e.g.,* United States v. Shannon, 540 F. Supp. 769 (N.D. Ill. 1982).

25. United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 822 (3d Cir. 1981); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (plurality opinion).

26. *See* United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 822 (3d Cir. 1981).

27. *See* United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

28. *See* United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609, 614 (D.C. Cir. 1981); United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 822 (3d Cir. 1981); United States v. Myers (*In re* National Broadcasting Co.), 635 F.2d 945, 952 (2d Cir. 1980).

29. *See* United States v. Myers (*In re* National Broadcasting Co.), 635 F.2d 945, 952 (2d Cir. 1980).

30. *Id.; see also* United States v. Pageau, 535 F. Supp. 1031 (N.D.N.Y. 1982); United States v. Dean, 527 F. Supp. 413 (S.D. Ga. 1981); *In re* Griffin Television, 7 Media L. Rep. (BNA) 1947 (W.D. Okla. 1981); United States v. Reiter, 7 Media L. Rep. (BNA) 1927 (D. Md. 1981).

"actual, as opposed to hypothetical, factors demonstrate that justice so requires."[31] For these courts the mere possibility that jurors would be prejudiced as a result of broader dissemination of evidence already held admissible poses no significant risk to a fair trial.[32] When there is only a small likelihood of a second trial or a trial on a related issue, courts advocating a strong presumption in favor of public access to records conclude that "the interest in avoiding the risk of potential prejudice . . . is seldom of sufficient weight to justify denying access."[33]

In contrast, other courts give less weight to the presumption of access. Because access is not a constitutional right, these courts conclude that it is counterbalanced by even a slight threat to a constitutional right.[34] For these courts, the right of access is "undeniably important" but does not merit the same degree of judicial protection as the freedom of the press guarantee.[35] It is "merely *one* of the interests to be weighed on the broadcasters' 'side of the scales.' "[36]

Because the presumption of access is not specifically protected by the Constitution, the courts that differentiate the presumption from underlying interests served by the first amendment conclude that effects of access on a defendant's constitutional right to a fair trial should be given much greater weight than any improvement of public understanding that might result from permitting access.[37] Consequently the effect on the freedom of the press interests is minimized; courts find the interest of the press satisfied by providing transcripts and permitting the broadcast press to view and hear the evidentiary recording.[38]

B. Limitations of the Common Law Presumption of Access to Court Records

Courts adopting a strong presumption in favor of news media ac-

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31. United States v. Edwards (*In re* Video-Indiana, Inc.), 672 F.2d 1289, 1290 (7th Cir. 1982); *see also* United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609, 618 (D.C. Cir. 1981); United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 827 (3d Cir. 1981); United States v. Mitchell, 551 F.2d 1252, 1261 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

32. *See* United States v. Edwards (*In re* Video-Indiana, Inc.), 672 F.2d 1289, 1296 (7th Cir. 1982); United States v. Myers (*In re* National Broadcasting Co.), 635 F.2d 945, 953 (2d Cir. 1980).

33. United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609, 618 (D.C. Cir. 1981).

34. *See, e.g.*, Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); United States v. Bolen, 8 Media L. Rep. (BNA) 1048 (S.D. Fla. 1981).

35. *See* Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 432 (5th Cir. 1981).

36. *Id.* at 434 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 602 (1978)) (emphasis in original).

37. *See, e.g., id.* at 431 ("It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury.").

38. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978); Belo Broad-

cess to evidentiary recordings respond more adequately to the competing interests that merit judicial recognition than do courts adopting the mechanical approach that finds the presumption overcome by the possible existence of any conflicting constitutional interest. Nevertheless, failure to give the presumption of access a constitutional basis weakens the analysis of courts recognizing a strong presumption of access.

1. Elevation of nonconstitutional interests above recognized constitutional rights— Adoption of a strong presumption of access neglects the distinction between rights protected by the federal Constitution and privileges that derive from the common law tradition of American legal institutions. By acknowledging that the bases of the presumption are nonconstitutional yet allowing that presumption to counterbalance a defendant's right to a fair trial, courts effectively allow a common law privilege to exceed the recognized scope of the constitutional rights to which it is related.

The theoretical incoherence is the result of a false starting-point of the legal analysis. Although the procedural issue is posed in terms of access, the true underlying conflict of interests stems from the prospective public dissemination of information. It is only because courts cannot effectively prohibit the broadcast of evidentiary recordings after the news media have obtained copies of them[39] that the issue is posed in terms of restricting the right of access or eliminating a right to copy from the scope of the right of access.

2. Failure to consider adequately the independent interests of news media— Courts acknowledge that the presumption in favor of access effectuates values traditionally protected by the first amendment,[40] but they sometimes implement the presumption by considering whether the public has sufficient understanding of a judicial proceeding and whether broadcast of the evidentiary recordings is an "improper purpose."[41] Such an analysis does not recognize either the independent interest of the news media, the party actually seeking access, or the unique role of the news media in effectuating first amendment interests.

By determining whether the public has sufficient understanding of events, the courts elaborate impermissible limitations on the free communication of information. In fact, it is only in the context of the

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casting Corp. v. Clark, 654 F.2d 423, 427 (5th Cir. 1981); United States v. Bolen, 8 Media L. Rep. (BNA) 1048, 1049 (S.D. Fla. 1981).

39. Judicial use of prior restraints to prevent publication of information in the hands of the press is strictly limited by the Constitution. *Cf.* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

40. *See supra* notes 24-27 and accompanying text.

41. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); United States v. Edwards (*In re* Video-Indiana, Inc.), 672 F.2d 1289 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814 (3d Cir. 1981).

competing interests of fair trial and free press that the level of public understanding assumes significance. Any increase of public understanding is a recognized social value, and the sufficiency of public understanding can be only a minimum acceptable level, against which other interests can be balanced. Courts should not, as the starting-point of their analysis, decide whether the increase in public understanding of an event that results from exposure to the evidentiary recordings is necessary.

Such a paternalistic approach is objectionable as a matter of public policy. Moreover, judicial selection of information that is acceptable for broadcast directly interferes with the interest of the news media to gather and disseminate information, to make editorial judgments about the public presentation of information,[42] and to choose the form in which information will be communicated.[43]

3. Vagueness and irrelevance of factors considered in applying the presumption— Because the presumption in favor of access can be rebutted by an improper purpose, courts consider not only the public interest in dissemination of the information but also the integrity of the judicial system and the motives of the news media.

The standards for determining improper purpose are subjective and vague. The doctrine may be applied beneficially to protect privacy interests of individuals who appear in the recordings, yet improper purpose may also be interpreted expansively to deny access to legitimately interested parties. Because the interests of the news media are not theoretically recognized in applying the presumption of access, they are either ignored or possibly considered improper.

Moreover, considerations of purpose are irrelevant. It is not the motives for, but the consequences of, the broadcast of the evidentiary recordings that potentially affect the defendant's right to a fair trial, the public's interest in being fully informed, and the judicial system's distinct interests in preserving its integrity.

II. RECOGNIZING A CONSTITUTIONAL RIGHT OF ACCESS TO EVIDENTIARY RECORDINGS

The United States Supreme Court recently held that a state statute closing trials during the testimony of rape victims violated the constitutional right of the public to attend criminal trials.[44] Notwithstand-

42. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

43. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion). *See generally* Denniston, *Right of Access: Birth of a Concept*, 2 CAL. LAW., Nov. 1982, at 47; Note, *A Foot in the Government's Door — Access Rights of the Press and Public:* Richmond Newspapers, Inc. v. Virginia, 12 U. TOL. L. REV. 991, 1006-26 (1981).

44. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

ing the availability of alternative sources of information regarding the substance of the testimony, the Court found rooted in the first amendment the right of access by the press to criminal trials.[45] Despite a clear opportunity to limit the right of access to physical attendance,[46] the opinion broadly interpreted the first amendment to include the exercise of rights "necessary to the enjoyment of other [established] First Amendment rights,"[47] and characterized the right of access to criminal trials as necessary to assure the effective exercise of free discussion of government functions.[48]

The basic social interests requiring the recognition of a constitutional right of public access to criminal trials are the same interests that lead courts to adopt the presumption of access to evidentiary recordings: safeguarding the integrity of the judicial process by encouraging public scrutiny and protecting the informed participation of citizens in the government.[49] Moreover, the constitutional analysis adopted by the Court in recognizing the right of access by the public and press to criminal trials strongly suggests that that right should be extended to embrace the right of the press to have access to evidentiary recordings in criminal trials for purposes of copying and broadcasting them.

A. The Devitalization of Supreme Court Precedent Denying a Constitutional Right of Access

The Supreme Court's denial of a constitutional basis for a right of access to evidentiary proceedings[50] is of questionable authority after

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45. The Massachusetts trial court had ordered the exclusion of the press and public during the testimony of a minor rape victim, but the court did not deny the press access to the trial transcript, thus assuring that the press and public had "prompt and full access to all of the victim's testimony." *Id.* at 2625 (Burger, C.J., dissenting). Nor was the press denied access to court personnel or other sources that provided an account of the testimony. Nevertheless, the Supreme Court held that the mandatory closure statute violated the first amendment right of access to criminal trials. *Id.* at 2622.

46. The Court previously recognized only a constitutional right to attend criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558 (1980) (plurality opinion). Concurring opinions, however, elaborated a first amendment basis for a broader right of access to criminal trials. *Id.* at 604 (Blackmun, J., concurring); *id.* at 598-601 (Stewart, J., concurring); *id.* at 586-89 (Brennan, J., concurring). In *Globe Newspaper Co.*, the Court could have based its decision on the holding of *Richmond Newspapers, Inc.* without discussing the opinions of the concurring justices.

47. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982); *see also* Bridges v. California, 314 U.S. 252, 263 (1941).

48. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982).

49. *Compare* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (constitutional right to attend trial) *with* United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (presumption of access to evidentiary recordings), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

50. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

the Court's articulation of the constitutional right of access by the press to criminal trials.

1. Unique fact situation confronted by the Court in prior case— In confronting the issue of press access to evidentiary recordings for the first time,[51] the Court had faced a unique situation. Broadcasters sought access to audio recordings introduced as evidence during criminal prosecutions stemming from the Watergate scandal, and the source of the tapes raised difficult issues of executive privilege. The Court denied access to presidential tapes because recent federal legislation provided a more appropriate method for public access.[52] Because of the unique circumstances of the case, its general applicability to other cases was limited from the start.[53]

2. Subsequent erosion of underpinnings of the Court's sixth amendment analysis— Several of the assumptions critical for the Court's denial of a constitutional right of access to evidentiary recordings have been subsequently eroded. For example, the Court rejected the sixth amendment as a basis for press access to the evidentiary recordings. The Court reasoned that although public understanding remained incomplete without an opportunity to hear the recordings, public understanding remained similarly incomplete with respect to the testimony of witnesses, yet there was no constitutional right to have such testimony recorded and broadcast.[54] The Court's assumption unnecessarily expanded its prior limitation on press access.[55] Moreover, subsequent cases have made clear that the Constitution requires no general ban on broadcast coverage of trials.[56] Indeed, it is no longer clear that there is no constitutional right to broadcast testimony of live witnesses.[57] Nor does the absence

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51. *See supra* note 8 and accompanying text.

52. *See supra* note 11.

53. Zimmerman, *supra* note 1, at 652, suggests that the failure of any member of the Court to cite *Nixon* in the next case involving media use of communications technology to gather news, Houchkins v. KQED, 438 U.S. 1 (1978), supports the view of *Nixon* as a unique case.

54. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978).

55. Estes v. Texas, 381 U.S. 532 (1965). In fact, the Court had established in earlier cases only that broadcast of judicial proceedings was impermissible when such broadcast deprived the defendant of a fair trial. *See id.* at 540-44. The logic of the precedent relied on by the Court was not applicable to the issue of access to evidentiary recordings, for virtually all the factors pertained to technical aspects of live broadcast of trials. Much of the Court's discussion of the potentially prejudicial impact of televising a trial focused on the disruption caused simply by the presence of the apparatus required for television. The Court was especially concerned that cameras might distract judges, witnesses, and jurors, and otherwise generally intrude upon the court proceedings. *Id.* at 544-51. The broadcast of evidentiary recordings copied out of court presents no such problems.

56. *See* Chandler v. Florida, 449 U.S. 560 (1981). *Chandler* did not decide whether a first amendment right of access to trials includes a right to broadcast trials, but at least one commentator believes recognition of such a right is only a matter of time. *See* Ares, *supra* note 4, at 175-77. *See generally* Zimmerman, *supra* note 1.

57. Commentators have advocated recognition of a constitutional "technological right of access" which would mean a constitutional right to broadcast trials. *See, e.g.*, Zimmerman, *supra*

of a recognized constitutional right to broadcast trials negate a constitutional right of access to evidentiary recordings for purposes of broadcast. On the contrary, live broadcast of a trial raises due process problems that are not presented by the broadcast of evidence that is copied out of court.[58]

3. Press participation is essential to the guarantee of a public trial— In previously denying that press access to evidentiary recordings was constitutionally protected, the Supreme Court rejected the argument that the right to a public trial protected press access to evidentiary recordings. The Court denied the press's standing to assert this argument on the basis that the public trial guarantee was for the benefit of the defendant and conferred no special benefit on the press. Consequently, the sixth amendment was satisfied by allowing part of the public and press to attend a criminal trial.[59] But the Court has recently recognized that the press has a distinct first amendment interest in a public trial, and that press access promotes interests of both the public and the defendant.[60]

4. The scope of physical access of the press is not necessarily limited to that of the general public— In refusing to recognize a special right of the news media to have access to evidentiary recordings, the Supreme Court concluded that news media were seeking "physical access" to evidence that was greater than that to which the public was entitled; the Court held that the rights of the press with regard to judicial proceedings are no greater than the rights of the general public.[61]

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note 1, at 654-65. Even without a constitutional requirement, 37 states now allow cameras in trial or appellate courts on some basis according to the Reporters's Committee for Freedom of the Press. *See Cameras in Court,* 69 A.B.A. J. 1213, 1213 (1983).

58. *See supra* note 55. In addition to the possible effect on trial participants noted in *Estes,* broadcast of trial proceedings exposes jurors and witnesses to publicity, which is troubling because they neither sought nor acted in such a manner prior to the trial as to attract such public attention. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

In contrast, the depiction of innocent third parties in evidentiary recordings is rare. *Compare In re* KSTP Television, 504 F. Supp. 360 (D. Minn. 1980) (activity involving a victim preceding a rape videotaped by the rapist) *with* United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609 (D.C. Cir.1981) (public official accepting a bribe filmed by hidden camera) *and* United States v. Bolen, 8 Media L. Rep. (BNA) 1048 (S.D. Fla. 1981) (activities of a money-laundering service connected with a drug conspiracy).

Similarly, allowing the videotaping of an entire trial may more readily result in the dissemination of misleading or prejudicial information because an entire trial will likely be compressed into a two to three minute clip whereas an evidentiary recording will often not exceed two or three minutes. *See generally* Ares, *supra* note 4, at 177-82; Kamisar, Chandler v. Florida: *What Can Be Said for a "Right of Access" to Televise Judicial Proceedings?,* in 3 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 149, 160-65 (1982).

59. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978).

60. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566-78 (1980) (plurality opinion).

61. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 609-10 (1978). Ironically, the Court has failed to make a similar distinction in its analysis of the common law presumption of access.

Nevertheless, although the general right of press access to judicial proceedings derives in part from the corresponding right of the public, the scope of the two need not be identical. On the contrary, precisely because press access is a crucial means of effectuating public access, the first amendment supports greater access for the news media than for individual citizens.[62]

5. The extent of "physical access" is reduced by technological changes— By emphasizing the "physical access" necessary for the news media to reproduce evidentiary recordings,[63] the Court tacitly expressed concern about the inconvenience caused by the access. Although inconvenience is a legitimate concern, the "physical access" concept is artificial in the context of replicating evidentiary recordings. Copying of any public record is a recognized component of access[64] and necessarily requires some sort of physical contact with or proximity to the record. In practice, the distinction between the physical access required for viewing, for photocopying, and for videotaping is insignificant. Moreover, any inconveniences will be reduced further as technological changes make recording techniques easier and faster.

B. Underlying Constitutional Values Compelling Recognition of a Constitutional Right of Press Access to Evidentiary Recordings

The underlying values the Court sought to promote by recognizing the right of the press to attend criminal trials similarly compel recognition of a constitutional right of press access to evidentiary recordings used in criminal trials. The establishment of the press's right of access

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62. Individual Justices of the Supreme Court have advocated recognition of an independent function for the press clause of the first amendment. *See, e.g.*, Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73, 577 n.12 (1980) (plurality opinion) ("[P]eople now acquire [information about trials] chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."); Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (Stewart, J., concurring); United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 822 (3d Cir. 1981).

Because of the unique public interest function of the press, it is frequently provided with amenities not available to the general public such as a press room or press pass. The Supreme Court has acknowledged that preferential treatment of the press is appropriate. Thus, preferential seating for representatives of the media is proper when the courtroom is not large enough to accomodate all who wish to attend. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 581 n.18 (1980) (plurality opinion); *see also* Houchins v. KQED, Inc., 438 U.S. at 16 (Stewart, J., concurring). Justice Brennan, concurring in *Richmond Newspapers, Inc.*, noted that as a practical matter the institutional press would often be the "fitting chief beneficiary of a right of access because [it] serves as the 'agent' of interested citizens and funnels information about trials to a large number of individuals." 448 U.S. at 586 n.2.

63. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 609-10 (1978).

64. *See supra* notes 17-18 and accompanying text.

to the trial reflects the Court's acceptance of the fact that the public depends upon the press for information.[65] The press must be allowed to disseminate complete information about a trial in order for the public to be able to understand the trial most fully and to participate most effectively in the political system. Because "actual observation of testimony or exhibits contributes a dimension [of information] which cannot be fully provided by second-hand reports,"[66] when aspects of actual observation can be reproduced by the broadcast of evidentiary recordings, such broadcast is desirable.

Recordings used as evidence in criminal trials may be important to the eventual verdict.[67] Indeed, the use of evidentiary recordings at trial may be a highly controversial issue, especially if the defendant is a public official.[68] There may be several plausible interpretations of the events depicted in the recordings. For the public to be in the best position to evaluate the facts and come to an informed opinion regarding the use of such evidence, it must experience the evidentiary recordings that are the actual subject of political and legal controversy. A mere description of the contents of such evidence no more satisfies the public's first amendment interests than does availability of alternative sources of information concerning the substance of a witness's testimony.[69]

C. *Accommodating the Right of the Press to Recordings With Defendants' Right to a Fair Trial*

Recognition of a press right of access to evidentiary recordings need not conflict with the defendant's interest in a fair trial.[70] Moreover,

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65. *See supra* note 62.

66. United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 824 (3d Cir. 1981).

67. It is not yet clear what probative weight jurors give evidentiary recordings. *See* Raburn, *Videotapes in Criminal Courts: Prosecutors on Camera*, 17 CRIM. L. BULL. 405, 425-26 (1981). Such recordings are, however, merely a more sophisticated variety of demonstrative evidence. *See* Heffernan, *Effective Use of Demonstrative Evidence "Seeing is Believing"*, 5 AM. J. TRIAL ADVOC. 427, 430 (1982). Demonstrative evidence has an "immediacy and reality which endow it with particularly persuasive effect." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 524-25 (E. Cleary 2d ed. 1972). Consequently, the outcome of a trial will likely be significantly affected by the content of an evidentiary recording; *see also* German, Merin & Rolfe, *Videotape Evidence at Trial*, 6 AM. J. TRIAL ADVOC. 209, 229 (1982). Nevertheless, the actual trial of a case in which evidentiary recordings play a major role "presents the same challenge as a case with any other form of evidence." Sear, *How to Try a Tape Case*, LITIGATION, Fall 1982, at 28-30.

68. *See* United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 822 (3d Cir. 1981). *See generally* Tigar, *Crime on Camera*, LITIGATION, Fall 1982, at 24. The propriety of law enforcement use of certain tactics may well be at issue. To some, the circumstances in which the evidentiary recording was made may seem "contrived and the scene too carefully arranged to resolve ambiguities in the government's favor." *Id.* at 25. To others, the same recorded material may show a defendant eager to violate the law.

69. *Cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982).

70. The defendant may not object to the use of evidentiary recordings by the press and might even join the news media's motion for access. In a case already highly publicized, broadcast

in most cases where there is potential conflict, the news media's right can be accommodated with the defendant's right to a fair trial. As a last resort, access should be limited if necessary to protect the defendant's right; but the press should be denied access only if a defendant can demonstrate that his right to a fair trial cannot be protected by less restrictive means. Any denial of access should be "narrowly tailored."[71]

1. The prejudicial effect of broadcast publicity on jurors compared with the effect of other kinds of publicity— Jurors can be prejudiced by exposure to evidentiary recordings or any other evidence outside the courtroom.[72] Some have argued that exposure to evidentiary recordings presents a greater danger of prejudice than other forms of evidence because broadcast media coverage has a greater psychological impact on viewers.[73] Nevertheless, it has not been established that broadcast information has a greater effect than any other form of communication;[74] in fact, some empirical studies suggest that the public

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of evidentiary recordings will increase the level of publicity only incrementally and will be unlikely to have any appreciable additional prejudicial effect. *See* United States v. Criden (*In re* National Broadcasting Co.), 648 F.2d 814, 825 (3d Cir. 1981). *But see* United States v. Bolen, 8 Media L. Rep. (BNA) 1048 (S.D. Fla. 1981). Furthermore, in many cases in which recordings are used as evidence, the defendant does not deny that the recorded events occurred and relies instead on a legal defense such as entrapment. *See, e.g.*, United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609 (D.C. Cir. 1981). In such cases, broadcast of the evidence would not as directly prejudice the defendant's case as cases where the content of the recordings is controverted or cases where radically different interpretations are placed on the recorded events.

71. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

72. All evidence presented to the jury out of court is potentially prejudicial. Repetition alone may enhance the effect of the evidence. The federal rules allow the exclusion of even relevant evidence if its value is outweighed by "needless presentation of cumulative evidence." FED. R. EVID. 403. Moreover, prejudicial evidence is frequently admitted, when relevant, because courts can control the prejudicial effects through limiting instructions. Indeed, in deciding whether to admit evidence, courts consider the probable effectiveness of such instructions. *See* FED. R. EVID. 403 advisory committee note. The prejudicial effects of such evidence may be aggravated if jurors are exposed to it again but without any limiting instructions.

Exposing jurors to evidentiary recordings out of court may present special problems. For example, it has been suggested that tapes might be edited to highlight the most incriminating portions with no opportunity for the defendant to bring forward his or her explanation or otherwise place the recordings in context. *See* Estes v. Texas, 381 U.S. 532, 574 (1965) (Warren, C.J., concurring); United States v. Jenrette (*In re* National Broadcasting Co.), 653 F.2d 609, 616 (D.C. Cir. 1981); Note, *Copying and Broadcasting, supra* note 15, at 575 n.159. *But see* Chandler v. Florida, 449 U.S. 560, 580-81 (1981).

73. *See generally* Note, *Copying and Broadcasting, supra* note 15, at 567 n.102, 575.

74. *See* Zimmerman, *supra* note 1, at 681; *see also* Wrightsman, *The American Trial Jury on Trial: Empirical Evidence and Procedural Modifications*, 34 J. SOC. ISSUES, Fall 1978, at 137, 145. Despite the broadcast media's attempts to depict events dramatically, jurors are not necessarily prejudiced by exposure to televised publicity. *See* Hoiberg & Stires, *The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. APPLIED SOC. PSYCHOLOGY 267, 274 (1973). The danger of prejudicial publicity arises from the capacity of the press to create a general public perception of guilt or innocence prior to trial. But there is no reason to believe the broadcast media is any more irreponsible than the print media. *See* Barber, *The Problem of Prejudice: A New Approach to Assessing the Impact of Courtroom Cameras*, 66

believes television news is biased.[75]

Moreover, the broadcast of recordings could actually diminish the possibility of prejudicial publicity in some cases by making re-enactments, with their attendant risks of misinterpretation, unnecessary.[76] Broadcast of evidentiary recordings might also corroborate an entrapment defense.[77] Consequently, to the extent that broadcast of the recordings has the potential for prejudicing jurors, there is no reason to believe that the danger of prejudice is qualitatively different from that presented by other forms of publicized evidence.

2. *Methods of limiting adverse effects of broadcast publicity*— The potential prejudicial effect of broadcast evidentiary recordings can be limited in a number of ways.

a. Instructions to the jury— The adverse prejudicial effect of publicity is minimized in part by the jurors' confidence in their superior understanding of the case.[78] Moreover, jurors can be instructed to avoid all news coverage of the trial.[79] If the trial or parts of the evidence are broadcast, jurors can be specifically admonished not to watch television.[80] Empirical research[81] indicates that jurors do obey instructions not to expose themselves to news coverage about the case.

b. Other measures of jury control limiting the adverse effect of broadcast of evidence— If the broadcast of evidentary recordings presents a real danger of prejudicing the jury or makes it impossible to select an impartial jury, traditional means of countering the adverse effects of the broadcast can be as effective as denial of access to the record-

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JUDICATURE 248, 255 (1983) (attributing prejudice not to media exposure but to nature of the trial process).

75. *See* G. COMSTOCK, TELEVISION IN AMERICA 50 (1980); SCHOLARLY RESOURCES, INC., THE GALLUP POLL: PUBLIC OPINION 1979, at 157-60 (1980). *But see* THE ROPER ORGANIZATION, INC., EVOLVING PUBLIC ATTITUDES TOWARD TELEVISION AND OTHER MASS MEDIA 1959-1980, at 3 (1980) (majority of the public thinks news and information programs on television present a balanced view).

76. *See* United States v. Mitchell, 551 F.2d 1252, 1262 n.45 (1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

77. *See* Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972).

78. *See* Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977).

79. *See* United States v. Mouzin, 9 MEDIA L. REP. (BNA) 1357, 1361 (C.D. Cal. Mar. 16, 1983); Zimmerman, *supra* note 1, at 682.

80. The exposure of witnesses to trial proceedings presents similar problems. In at least one case a conviction has been appealed in part because of the exposure of a witness to televised proceedings prior to testimony. The judge said, "This is something we didn't anticipate. But it was not really different than a witness reading a newspaper before he testifies. In the future we will probably make all witnesses sign a statement saying they will not watch television before they testify." *Cameras in Court, supra* note 57, at 1213.

81. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966). *See generally* Bridgeman & Marlowe, *Jury Decision Making: An Empirical Study Based on Actual Felony Trials*, 64 J. APPLIED PSYCHOLOGY 91, 98 (1979); Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 448-50 (1977); Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977).

ings. Trial courts have considerable experience in the use of voir dire examinations, continuances, changes of venue, and sequestrations as methods to counter the effects of prejudicial publicity.[82] Although the effectiveness of some of these measures has been challenged,[83] there is no reason to believe these measures are less successful in countering prejudice resulting from broadcast publicity than prejudice from other forms of publicity.[84]

c. Acceptable levels of juror exposure to prejudicial information as comparable irrespective of communication medium— The obvious technical differences between broadcast and print publicity do not justify a stricter standard for determining acceptable levels of juror exposure to potentially prejudicial information when that information is broadcast.[85] The goal of a perfect, impartial jury is continuously compromised by our country's firm commitment to a vigorous public discussion of the operation of the judicial system. As a result of these competing values, the Supreme Court has long recognized that the Con-

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82. *See* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966) (discussing ways to minimize the effects of publicity on a jury). Courts prefer to screen out prejudiced veniremen, and extensive voir dire examination can be an effective way to counter extensive prejudicial publicity. *See* Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386, 391 (1974).

83. *See* Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 562-66 (1977). Continuances and changes of venue have sometimes been challenged as violating the sixth amendment. *See, e.g.*, Groppi v. Wisconsin, 400 U.S. 505, 510 (1971). *But see* Barker v. Wingo, 407 U.S. 514 (1972) (delay often works to the defendant's advantage and whether fair trial rights are violated depends on the particular facts of the case).

The limited empirical research in this area is in conflict and methodologically deficient in several respects. *See generally* Schmidt, *supra* note 81, at 444-49 (1977); Simon, *supra* note 81; Wrightsman, *supra* note 74. The most serious shortcoming of virtually all empirical research in this area is that the structure of the jury system for the most part prevents research on real juries; thus research relies on simulations. Simulated juries differ significantly from real juries; simulation cannot reproduce the "sense of solemn responsibility that undoubtedly has a powerful impact on real jurors' subjectivity, conformity to group behavior and serious commitment to established norms." Moreover, simulations are usually shorter than trials and so do not permit the diffusion of the effect of exposure to publicity that naturally occurs over a longer period of time. *See* Schmidt, *supra* note 81, at 448. Consequently, simulated studies will probably tend to exaggerate the effect of prejudicial publicity on juror behavior.

84. Almost all studies have focused on print publicity and have considered broadcast publicity, if at all, only in the context of narrative accounts of news events. Nevertheless the conclusions regarding the effect of print publicity are probably equally applicable to broadcast publicity. Because there is no reason to believe that broadcast coverage is inherently more damaging than print coverage, the effectiveness of curative measures for both is comparable. *See generally* Barber, *supra* note 74, at 255; Wrightsman, *supra* note 74, at 145; Zimmerman, *supra* note 1, at 681; Note, *From* Estes *to* Chandler: *The Distinction Between Television and Newspaper Coverage*, 3 COMM/ENT L.J. 503 (1981).

85. *Cf.* Chandler v. Florida, 449 U.S. 560, 575 (1981) ("[t]he risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage").

stitution does not require flawless trials,[86] and that jurors need not be completely ignorant of all facts relating to a case as long as they are able to suspend their impressions or opinions and reach a verdict based on the evidence presented at trial.[87] Appellate courts reviewing claims of jury prejudice consider the "totality of circumstances" in determining whether the defendant was denied a fair trial.[88] Courts recognize that trials can meet constitutional standards despite widespread hostile publicity.[89] This tolerance for the exposure of jurors to potentially prejudicial information should similarly be extended to the broadcast of evidentiary recordings.

3. Delay of access until after trial as unacceptable prohibition of access— Postponing release of evidentiary recordings until after the possibility for prejudice has passed in an effort to minimize the potential adverse effects of the broadcast of evidentiary recordings effectively prohibits access. Such a postponement would be justified only in the extreme case where access must be denied as the only way of protecting a defendant's right to a fair trial. Any indefinite postponement justified by a continuing possibility of prejudice should be unconstitutional; such a restraint of publication is not acceptable in the context of the print media[90] and should not be allowed in the context of the broadcast media.

4. Standards governing closure of criminal trials and prior restraints as applicable to prohibitions on news media access to or broadcast of recordings admitted in evidence— Because access to evidentiary recordings is a correlative right of the recognized right of public access to criminal trials,[91] the standards for denying access to the recordings after they have been introduced as evidence should be the same as the standards for closing the criminal trial to the public.

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86. It is enough that a defendant's rights are "scrupulously respected." McGautha v. California, 402 U.S. 183, 221 (1971); *accord* Vines v. Muncy, 553 F.2d 342 (4th Cir. 1977), *cert. denied,* 434 U.S. 851 (1981).

87. *See* Dobbert v. Florida, 432 U.S. 282 (1977); Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, 366 U.S. 717 (1961). To require total ignorance "[i]n these days of swift, widespread and diverse methods of communication" would be to establish "an impossible standard." *Id.* at 722-23.

88. Murphy v. Florida, 421 U.S. 794 (1975); *accord* United States v. Alberico, 604 F.2d 1315 (10th Cir.) (affirming conviction where a prosecutor released copies of videotaped encounters between the defendant and FBI undercover agents without trial court acquiescence and selected portions were broadcast during the pendency of the trial), *cert. denied,* 444 U.S. 992 (1979).

89. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976); Estes v. Texas, 381 U.S. 532, 561-62 (1965). *Compare* Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (conviction struck down due to "carnival atmosphere" of trial proceedings) *with* United States *ex rel.* Darcy v. Handy, 351 U.S. 454, 463 (1956) (conviction upheld against a claim of prejudicial publicity because trial was conducted in a "calm judicial manner"). Prejudice of "constitutional dimensions" must be demonstrated. *See* Chandler v. Florida, 449 U.S. 560, 581-82 (1981).

90. *See infra* note 94.

91. *See supra* notes 44-49 and accompanying text.

The circumstances in which closure of a criminal trial is permissible are extremely limited.[92] A useful test requires that a defendant seeking closure establish that it is "strictly and inescapably necessary in order to protect the fair-trial guarantee."[93]

In prohibiting news media broadcast of evidentiary recordings of which the news media have obtained copies, courts should be governed by the severe restrictions that limit the imposition of prior restraints.[94] In determining whether a restraining order is an appropriate solution to a problem of pretrial publicity, a court must consider the extent of pretrial news coverage, whether other measures could mitigate the effects of unrestrained pretrial publicity, and the effectiveness of a restraining order in the particular instance before the court.[95] Only if the defendant's right to a fair trial cannot be protected by less restrictive means is such a restraint allowable.

CONCLUSION

The right of the press to obtain access to evidentiary recordings used in criminal trials requires constitutional protection. The common law presumption of access currently employed by the courts does not give adequate weight to the first amendment values underlying the presumption. Recognition of a constitutional right of access better allows the press and public to fulfill their roles as guardians of the judicial system.

A constitutional right of press access can be accommodated with a defendant's right to a fair trial in many cases. Courts should deny news media access to evidentiary recordings only when there are no

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92. The Supreme Court has not specifically elaborated acceptable criteria for closing criminal trials, but the Court has stated that where access to a criminal trial is denied to inhibit disclosure of sensitive information, the denial must be "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest." Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2620 (1982) (dicta); *see also* United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982). Prior to *Globe Newspapers,* the Court had indicated that a criminal trial must remain open in the absence of an "overriding interest articulated in the findings." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980). Neither decision elaborated the nature of the countervailing interest necessary to justify closure.

93. Gannett Co. v. DePasquale, 443 U.S. 368, 440 (1979) (Blackmun, J., concurring in part and dissenting in part). At a minimum, the defendant should show that there is "a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public," that there is a "substantial probability that alternatives to closure will not protect adequately his right to a fair trial," and that there is "a substantial probability that closure will be effective in protecting against the perceived harm." *Id.* at 441-42.

94. The Court characterizes prior restraints as "the most serious and least tolerable infringement[s] on First Amendment rights," justified only in unusual cases. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-62 (1976); *see also supra* note 9.

95. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976). The concurring opinion erected an even higher burden of proof. *See id.* at 570-71 (White, J., concurring); *see also id.* at 571-72 (Powell, J., concurring).

effective alternative means to protect the defendant's right to a fair trial. A denial of access should be justified by the same high burden of proof currently imposed on those seeking closure of a criminal trial or a prior restraint on publication.

—Teri G. Rasmussen